FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 18 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 55

MARY DUKE BIDDLE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF AMICI CURIAE ON PETITION FOR WRIT OF CERTIORARI

TOLBERT, EWEN & PATTERSON,
Attorneys for F. W. Woolworth Co.,
Appearing as Amici Curiae,
45 Cedar Street,
New York, N. Y.

WARD V. TOLBERT,
JOHN L. MCMASTER,
BERTRAM F. BONGARD,
DOUGLAS H. THAYER,
of Counsel.

INDEX

PAGE

Reasons for Filing Brief as Amici Curiae 1

(1) Mary Duke Biddle v. Commissioner of Internal Revenue—October Term, 1937—No. 55 3

(2) United Shoe Machinery Corporation v. Thomas v. White; United Shoe Machinery Corporation v. Thomas v. White; United Machinery Corporation v. Malcolm E. Nichols—October Term, 1937—Nos. 185, 186, 187 3

As to Biddle v. Commissioner (British Dividend Tax Credit) 4

As to United Shoe Machinery Corporation Group of Cases (Limitations on the Amount of Credit)... 6

Conclusion 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 55

MARY DUKE BIDDLE,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION

Reasons for Filing Brief as Amici Curiae

The attorneys filing this brief are attorneys for F. W. Woolworth Co., plaintiff-appellant, in *F. W. Woolworth Co.* v. *The United States of America.*

F. W. Woolworth Co. brought suit in the United States District Court for the Southern District of New York for refund of Federal income taxes for the years 1922, 1923, 1924 and 1925 in the amount of $558,704.75. Two of the principal issues involved in this proceeding were:

(1) Whether the British income tax deducted at the source and withheld on the payment of an English dividend is a tax paid by the shareholder so as to constitute an al-

lowable credit under Section 238 (a) of the Revenue Acts of 1921 and 1924, which allows credit on account of income taxes paid to foreign countries.

(2) Whether the separate credit allowed under Section 238 (e), for foreign income taxes paid by a foreign subsidiary of a domestic corporation, is subject to the limitation on the amount of the credit contained in Section 238 (a), which allows credit for foreign income taxes paid by domestic corporations.

On the trial of the issues, the District Court (15 Fed. Supp. 679) found on these particular questions in favor of the taxpayer. On other questions, not here involved, it decided in favor of the Government, and it granted judgment allowing recovery to the plaintiff in the sum of $258,518.12. Both parties appealed, and on the appeal the United States Circuit Court of Appeals, Second Circuit, in its decision dated July 1[illegible] 1937, adhered to its earlier decision in the Biddle case as to the British dividend tax, and held that credit was not allowable, and, under this disposition of the case, further held that the issue as to the limitation on the amount of the credit had become moot. Other issues not here involved were decided partly in favor of the Government and partly in favor of the taxpayer, and, accordingly, the Court reversed the judgment below and directed that the cause be remanded for further proceedings not inconsistent with its decision. Under an order signed by Mr. Justice CARDOZO on September 1, 1937, F. W. Woolworth Co., plaintiff-appellant, has been granted an extension of time in which to file petition for certiorari, which has not been filed to date because of the pendency of the petitions referred to herein involving these precise questions.

The two issues stated above are the issues separately involved in the two petitions for certiorari pending in the following causes:

(1) Mary Duke Biddle v. Commissioner of Internal Revenue—October Term, 1937—No. 55.

This is a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, Second Circuit (86 Fed. 2, 718), deciding that credit is not allowable on account of the British dividend tax deducted and withheld on the payment of an English dividend. The Government has filed a memorandum with this Court stating that it does not oppose the granting of the writ.

(2) United Shoe Machinery Corporation v. Thomas v. White; United Shoe Machinery Corporation v. Thomas v. White; United Machinery Corporation v. Malcolm E. Nichols—October Term, 1937—Nos. 185, 186, 187.

This is a petition for a writ of certiorari to review the decision of the United States Circuit Court of Appeals, First Circuit, dated April 5, 1937, in so far as that Court has held that the limitation on the amount of the credit allowable under Section 238 (a) also applies to the separate credit allowable under Section 238 (e). A further question involving the amount of the limitation is also at issue in this group of cases, but is not involved in the Woolworth case.

All parties in each of these cases have consented to the filing of briefs by the undersigned as *amici curiae,* and identical briefs are being separately filed in each of these cases, so that copies may be conveniently before the Court in its consideration of these petitions. The Woolworth Co. case forcefully illustrates the close relation of these two questions; and, in addition to the reasons urged in the briefs filed by the petitioners why these writs should be granted, we respectfully submit the following further statement of reasons:

As to Biddle v. Commissioner (British Dividend Tax Credit).

1. The question is of continuing substantial public importance. The most important foreign country from which United States taxpayers derive income is Great Britain, and the most important source of such foreign income is in the form of dividends from which the English tax has been deducted at the source. If credit is allowable under the statute, that fact should be established by decision of this Court, and the present controversy on this question ended. If the credit is not allowable, then it is equally important that this fact be determined, for such a finding would render the credit section of the statute inoperative and ineffective in its most important quarter, and if this is the law, opportunity should be afforded Congress to give further statutory relief. The issue does not involve merely the present litigants but extends to all taxpayers under all the Revenue Acts who own shares of English stock.

2. The Circuit Courts of Appeals for the First and Third Circuits are in sharp conflict with the Circuit Court of Appeals, Second Circuit, on this question; and, we respectfully submit, their opinions set forth a more reasonable view of the law and one which effectuates the relief provisions which Congress clearly had in mind when it enacted this provision. The decisions of these three Circuits on this question (the decision of the Third Circuit having been handed down since the filing of the petitions herein) are as follows:

(a) Biddle v. Commissioner (now pending on petition) which was decided by the Second Circuit on December 7, 1936 in favor of the Government.

(b) United Shoe Machinery Corporation v. White, and associated cases (now pending on petition), which were decided by the Circuit Court of Appeals, First Circuit, on April 5, 1937 in favor of the taxpayer.

(c) F. W. Woolworth Co. v. The United States of America, in which the Second Circuit, in its decision dated July 19, 1937, adhered to its earlier decision in the Biddle case.

(d) Elkins v. Commissioner, which was decided by the Circuit Court of Appeals, Third Circuit, on July 21, 1937 in favor of the taxpayer.

The number of these decisions in itself shows the present importance of this subject.

3. The Second Circuit in the Biddle case, even though it decided the issue in favor of the Government, held that under the British income tax system the shareholder pays the British income tax withheld from dividends. The conclusion of the Second Circuit, that nevertheless the credit is not allowable for the reason that under our principles of taxation the shareholder in such circumstances would not be regarded as the taxpayer, is clearly untenable, inasmuch as it determines the incidence of a foreign tax, not by the law which imposes it, but by the mechanics of our own system of taxation. The basic decision of the Second Circuit in fact supports the position of the taxpayers herein, and, under such a premise, the Second Circuit should properly have found that the credit is allowable.

4. The construction urged by the taxpayers, namely, that credit is allowable for the British income tax thus deducted and withheld at the source, is the initial construction adopted by the Commissioner of Internal Revenue on the first enactment of the credit provisions, and is a construction which was followed by the Commissioner for more than a decade of administration. The fact that the Commissioner so long followed this original construction, and so sharply reversed the Bureau's position on this important question, justifies review by this Court of the issue.

As to United Shoe Machinery Corporation Group of Cases (Limitations on the Amount of Credit).

1. The question at issue in the United Shoe Machinery Corporation group of cases, namely, as to the total amount of credit allowable where foreign income taxes are paid by a controlled subsidiary, is so closely related to the question presented in the Biddle case that it should be determined by this Court at the same time in the public interest.

2. If this Court should grant the petition in the Biddle case, and should on the argument of the case decide that the British dividend tax credit is properly allowable, then the effect of its decision will be to increase the amount of the credit over the amount now recognized as allowable by the Commissioner, and to that extent the question of the amount of the limitation will become of increasing practical importance. In both the Woolworth case and the United Shoe Machinery Corporation group of cases, the amount of the credit which will be allowable, if credit may be claimed on account of the British dividend tax, will depend in the last analysis on the decision of this further question as to whether the limitation in Section 238 (a) controls the amount of credit allowable under Section 238 (e), which itself has its own separate limitation provisions. Moreover, in all cases arising prior to the later amendment of the Act on this question, this will be true wherever a domestic corporation, in addition to receiving British dividends, owns a foreign subsidiary which pays foreign income taxes.

3. While there is no direct conflict on this question in the decisions of the Circuit Courts of Appeals, it is significant that the Second Circuit in the Woolworth Co. case has treated the problem as moot and has by that disposition of the question refused to adopt or follow the decision of the First Circuit on this question. In addition, the Gov-

ernment in its argument of the question in these several cases has frankly admitted in its briefs that the question is *ambiguous.*

4. A further reason why this question should be reviewed is similar to that urged above as to the British dividend tax credit, namely, that the construction on which the taxpayers rely is the initial construction which the Commissioner adopted on the first enactment of the credit provisions and followed over a period of several years.

Conclusion.

It is not only in the interest of the private litigants, but in the public interest, that these questions relating to credits on account of foreign income taxes be reviewed by this Court, and the law relating to these issues authoritatively established. Moreover, the very complexity of the credit provision of the statute (admittedly one of the most intricate sections in the statute), the sharp reversal of position on both these questions made by the Commissioner in recent years, as illustrated by the present cases, and the fact that the cases arise under what is clearly a relief section of the statute, all make it of first importance that these issues be determined by this Court, and, we submit, justify its review of these questions.

It is therefore respectfully submitted that the application for the writ in each of these cases should be granted.

TOLBERT, EWEN & PATTERSON,
Attorneys for F. W. Woolworth Co.
45 Cedar Street,
New York, N. Y.
Amici Curiae.

WARD V. TOLBERT,
JOHN L. MCMASTER,
BERTRAM F. BONGARD,
DOUGLAS H. THAYER,
of Counsel.